Petition

81-1970

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SAMUEL T. ISAAC & ASSOCIATES, INC. - Petitioner

versus

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION
SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
INSPECTOR GENERAL OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SECRETARY OF THE UNITED STATES TREASURY - - - - - - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Where both federal question jurisdiction and a waiver of sovereign immunity were present, did the United States District Court have jurisdiction to hear a mortgage banker's claims against the Government National Mortgage Association which requested the court to set aside a de facto debarment under the Administrative Procedure Act and to award from the separate fund maintained by GNMA a judgment of incidental damages because of GNMA's failure to comply with the Guaranty Agreements, GNMA's regulations, and the National Housing Act?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

SAMUEL T. ISAAC & ASSOCIATES, INC. - *Petitioner*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION
SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
INSPECTOR GENERAL OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SECRETARY OF THE UNITED STATES TREASURY - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on the 11th day of December, 1981, and the subsequent order denying a rehearing entered on the 27th day of January, 1982.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of the United States District Court for the Eastern District of Kentucky which refused to exercise jurisdiction over the claims of the Petitioner to set aside a de facto debarment under the Administrative Procedure Act and to grant an award of incidental and consequential damages against the Government National Mortgage Association. Instead, the court below transferred the action to the United States Court of Claims.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 11, 1981 and the order denying rehearing was entered on January 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where both federal question jurisdiction and a waiver of sovereign immunity were present, did the United States District Court have jurisdiction to hear a mortgage banker's claims against the Government National Mortgage Association which requested the court to set aside a de facto debarment under the Administrative Procedure Act and to award from the separate fund maintained by GNMA a judgment of incidental damages because of GNMA's failure to com-

ply with the Guaranty Agreements, GNMA's regulations, and the National Housing Act?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Fifth Amendment to the United States Constitution

Administrative Procedure Act, 5 U.S.C. 701-706

National Housing Act, 12 U.S.C. 1702, 1720(d), 1721(g), 1723a(a)

28 U.S.C. 1331, 1346(a)(2), 1491

24 C.F.R. 390.3(h), 390.47

(The pertinent text of said provisions are set forth in the appendix.)

STATEMENT OF THE CASE

Samuel T. Isaac & Associates, Inc. (STI) is the smallest mortgage banker in the state of Kentucky and was an issuer of mortgage-backed securities in the Government National Mortgage Association (GNMA) program from the beginning of the firm in 1975 until GNMA attempted to debar STI from the program in 1980. As an issuer of securities, STI must develop a relationship with private investors who provide the funds to make home loans. STI must then originate the loans by taking applications from the prospective homeowners. Once STI has brought homeowner and investor together, GNMA's role is to guarantee that the investor will receive monthly payments of principal and interest from STI during the life of the loan. The duties and responsibilities of STI and GNMA under

the mortgage-backed securities program are incorporated in individual Guaranty Agreements, 24 C.F.R. 300, and the National Housing Act.

Immediately after GNMA's attempt to debar STI in September of 1980, STI instituted this litigation. Its claim against GNMA was three-fold: First, STI sought to have the de facto debarment set aside under the Administrative Procedure Act because that action was arbitrary and capricious, an abuse of discretion, unwarranted by the facts of the case, and contrary to the terms of the Guaranty Agreements between the parties, 24 C.F.R. 390.3(h), 12 U.S.C. 1721(g), and the Fifth Amendment. Secondly, STI sought an award of incidental and consequential damages out of the separate fund maintained by the GNMA mortgage-backed securities program. Third, STI alleged that GNMA had wrongfully interfered with STI's contractual relations with a sister agency, the Federal National Mortgage Association.

STI also sought writs of mandamus against the Secretary of the Department of Housing and Urban Development (HUD), the HUD Inspector General, and the Secretary of the Treasury. In its complaint and amended complaints, STI invoked the jurisdiction of the district court pursuant to 28 U.S.C. 1331 in that the action was against an agency of the United States arising under the Fifth Amendment, the Administrative Procedure Act, the National Housing Act, and 24 C.F.R. 390.3(h). STI invoked the waivers of sovereign immunity for HUD and GNMA at 12 U.S.C. 1702, 1723a(a) which allow these agencies to be sued in

federal district court for money damages in excess of $10,000.00.

On June 17, 1981, the district court ruled on cross motions for summary judgment without oral argument. The district court denied the writs of mandamus and held that the contractual interference claim was barred by the Federal Tort Claims Act. The district court then declined to exercise jurisdiction over the claim under the Administrative Procedure Act and the claim for money damages. The action was transferred to the United States Court of Claims. An appeal was taken to the Sixth Circuit on the district court's refusal to exercise jurisdiction over the APA claim and the claim for money damages. The Sixth Circuit affirmed the decision and reasoning of the district court and denied a petition for rehearing.

REASONS FOR GRANTING THE WRIT

Where Both Federal Question Jurisdiction and a Waiver of Sovereign Immunity Were Present, the United States District Court Erred by Refusing to Exercise Jurisdiction to Hear a Mortgage Banker's Claims Against the Government National Mortgage Association Which Requested the Court to Set Aside a De Facto Debarment Under the Administrative Procedure Act and to Award From the Separate Fund Maintained by GNMA a Judgment of Incidental Damages Because of GNMA's Failure to Comply With the Guaranty Agreements, GNMA's Regulations, and the National Housing Act.

In holding that it did not have jurisdiction to hear STI's claims under the Administrative Procedure Act and STI's breach of contract claim, the court below has decided important questions of federal law in direct

conflict with decisions of this Court and of eight other circuits. The decision of the court below to abdicate jurisdiction and transfer this action to the United States Court of Claims is also contrary to the interest of justice. The practical effect of this decision is to preclude a determination on the merits by any court and to perpetuate the bottleneck of litigation which plagues our federal courts seeking to determine once and for all which court is the proper forum for claims against the many "sue and be sued" agencies of the government. The court below reached its erroneous decision on a misinterpretation of the Administrative Procedure Act and the Tucker Act and by its steadfast reliance upon a reversed opinion of the District of Columbia district court.

The opinion of the court of appeals below affirms the holding of the district court that the Court of Claims has "exclusive" jurisdiction over STI's breach of contract claim. This opinion does not square with this Court's holding in *FHA Region 4* v. *Burr*, 309 U. S. 242 (1940), nor does it recognize that the GNMA Mortgage-Backed Securities Program does not operate on any funds appropriated from the United States Treasury. Instead, the court below relied solely upon the case of *Molton, Allen, & Williams, Inc.* v. *Harris*, 436 F. Supp. 853 (D.C.D.C. 1977), which was reversed by the District of Columbia Court of Appeals. The district court in the *Molton* case refused to follow the controlling decision in that circuit, *Trans-Bay Engineers & Builders, Inc.* v. *Hills*, 551 F. 2d 370 (D.C. Cir. 1976), and misinterpreted the effect of the Tucker Act, 28 U.S.C.

1346(a)(2), and 28 U.S.C. 1491. Following the precedent of *Trans-Bay, supra,* the District of Columbia Court of Appeals entered summary judgment against GNMA on the merits of the contract claim, rejecting the district court's opinion that only the Court of Claims could render such a judgment. *Molton, Allen, & Williams, Inc.* v. *Harris,* 613 F. 2d 1176 (D. C. Cir. 1980).

Under the holding of *Trans-Bay, supra,* STI properly brought this action in the district court because it arises not only out of the 15 Guaranty Agreements, but also out of 24 C.F.R. 390.3(h), 12 U.S.C. 1721(g), and the course of conduct and dealing between HUD, GNMA, STI, and other mortgage bankers. Such an action can be maintained against GNMA and HUD in the district court by virtue of the express waivers of sovereign immunity in 12 U.S.C. 1702 and 12 U.S.C. 1723a(a) and by virtue of federal question jurisdiction under 28 U.S.C. 1331. Where express waivers of sovereign immunity are invoked by a litigant, the Tucker Act does not restrict the jurisdiction of the district court in any manner. *Trans-Bay, supra.* By ignoring these waivers and the federal questions involved, the court below acted contrary to the mandate of this Court in *FHA* v. *Burr, supra.*

In *FHA* v. *Burr, supra,* this Court held that an action for money damages sounding in contract was properly brought in the district court pursuant to the waiver in 12 U.S.C. 1702. This Court went on to explain that Congress intended all claims directed against FHA to be paid out of funds appropriated under the

National Housing Act. This Court made it clear that only funds which had been severed from the United States Treasury by appropriation to a "sue and be sued" agency could be subject to execution. Five circuits have followed this reasoning in holding that jurisdiction over contract claims against HUD and/or GNMA is proper in the district court. *Ferguson* v. *Union National Bank,* 126 F. 2d 753 (4th Cir. 1942); *George H. Evans & Company* v. *United States,* 169 F. 2d 500 (3rd Cir. 1948); *Trans-Bay, supra; Molton, Allen, & Williams, supra; Bor-Son Building Corporation* v. *Heller,* 572 F. 2d 174 (8th Cir. 1978); *S. S. Silberblatt, Inc.* v. *East Harlem Pilot Block,* 608 F. 2d 28 (2nd Cir. 1979).

The opinions of the Eighth and Fourth Circuits, citing *FHA* v. *Burr, supra,* are particularly instructive. The Eighth Circuit in *Bor-Son Building Corporation, supra,* notes that the 12 U.S.C. 1702 waiver of sovereign immunity should be "liberally construed" in light of congressional intent that federal government corporations be suable in district courts. The Fourth Circuit in *Ferguson, supra,* points out that transferring cases to the Court of Claims would make 12 U.S.C. 1702 a nullity. That court said at page 756:

> It could hardly have been intended by Congress that suits for over $10,000.00 could be brought in any state court of general jurisdiction, but in the federal jurisdiction, only in the Court of Claims.

Two other circuits, the Fifth and the Ninth, also recognize that GNMA and/or HUD may be sued for breach of contract in the district courts, but these two

circuits stand alone in their additional requirement that the funds available to pay damages cannot be derived in any manner from the United States Treasury. This line of cases is contrary to *FHA* v. *Burr, supra,* which held that damages could be paid out of any funds appropriated under the National Housing Act. Despite this strict requirement by the Fifth and the Ninth Circuits, suit was allowed in the district courts in two cases which held a non-appropriated fund did exist — *Industrial Indemnity, Inc.* v. *Laudrieu,* 615 F. 2d 644 (5th Cir. 1980) and *Southern Sog, Inc.* v. *Roland,* 644 F. 2d 376 (5th Cir. 1981). Three other cases held that such a non-appropriated fund did not exist and suit was not allowed in the district courts — *Marcus-Garvey Square* v. *Winston Burnett Construction,* 595 F. 2d 1126 (9th Cir. 1979); *DSI Corp.* v. *HUD Secretary,* 594 F. 2d 177 (9th Cir. 1979); and *Lomas & Nettleton* v. *Pierce,* 636 F. 2d 971 (5th Cir. 1981).

Only the Fifth and the District of Columbia Circuits have considered the issue of district court jurisdiction over contract claims against GNMA pursuant to the waiver of sovereign immunity in 12 U.S.C. 1723a(a). The District of Columbia Circuit in the *Molton* case followed the reasoning of this Court in *FHA* v. *Burr, supra.* There was a waiver of sovereign immunity in 12 U.S.C. 1723a(a) and GNMA receives appropriations from the United States Treasury under the National Housing Act to carry out its "whole loan" program. 12 U.S.C. 1720(d). The District of Columbia Circuit held that jurisdiction was proper in district court for an award of damages against GNMA.

The Fifth Circuit, applying its more stringent requirements to an almost identical fact pattern, held in the *Lomas & Nettleton* case that GNMA's funds were appropriated from the United States Treasury and therefore could not be paid over in a damage judgment. The Fifth Circuit held that in order for GNMA's waiver of sovereign immunity in 12 U.S.C. 1723a(a) to be effective, there must exist a fund to pay damages which is not derived in any manner from the United States Treasury. Since the litigation involved the "whole loan" program, the court determined that the funds used for this program were derived entirely from the treasury. The court then transferred the action to the Court of Claims.

In the present case, the GNMA Mortgage-Backed Securities Program is involved and not the "whole loan" program. The MBS program is totally funded through payments GNMA collects from STI and other mortgage bankers. Each month mortgage bankers pay to GNMA .06% of the outstanding principal balance of securities the mortgage bankers have issued. Additionally, the mortgage bankers pay GNMA a $500.00 application fee each time they issue new securities. The government witnesses and attorneys agreed that no treasury funds are appropriated to the MBS program by virtue of 12 U.S.C. 1721(g) and 24 C.F.R. 390.47. From the testimony of GNMA's current Executive Vice President, Warren Lasko, the amount of this non-appropriated fund which GNMA maintains is easily calculated to be at least Sixty-Four Million, Five Hundred Thirty Thousand Dollars ($64,530,000.00)

for 1980 alone. Therefore, even if the lower court chose to align itself with the Fifth and Ninth Circuits in their more stringent requirements, it is clear that jurisdiction is proper in the district court over a claim for money damages against GNMA because the fund available to pay damages in this case is not derived in any manner from the United States Treasury.

The First Circuit has used a completely different set of guidelines in determining whether the waivers of sovereign immunity in the "sue and be sued" clauses are effective. The court in *Armor Elevator Co.* v. *Phoenix Urban Corp.*, 655 F. 2d 19 (1st Cir. 1981) held that 12 U.S.C. 1702 waives immunity for suits in the district court where the Secretary of HUD is acting to carry out the provisions of the National Housing Act. The First Circuit relies upon this Court's holding in *FHA* v. *Burr, supra,* at page 490. There this Court held that when Congress permits an agency to sue and be sued:

> It cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in the narrow sense.

> In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue and be sued", that agency is not less amenable to judicial process than a private enterprise would be.

The First Circuit goes on to criticize the Ninth Circuit for its interpretation of *FHA* v. *Burr, supra,* in limiting suits against the Secretary of HUD to cases where there is a separate fund authorized to be used for payment of damages. In a well-reasoned opinion, the First Circuit holds that the better view is to look to the type of activity which is the subject of the lawsuit and determine if that activity is within the realm of the specific waiver of sovereign immunity enacted by Congress. The First Circuit holds that all cases involving contracts with the HUD Secretary are within the realm of the waiver. Under this standard as well, STI must prevail on its claim of entitlement to trial in the district court. As the opinion of the court below now stands, the Sixth Circuit has ruled contrary to this Court and to each of the eight circuits which have considered the issue of district court jurisdiction over claims for money damages against GNMA and/or HUD pursuant to 12 U.S.C. 1702 and 12 U.S.C. 1723a(a).

In addition to its refusal to hear STI's claims for incidental and consequential damages, the court below also refused to assume jurisdiction of STI's claim to set aside the de factor debarment action under the Administrative Procedure Act. 5 U. S. C. 701-706.

STI alleged that GNMA's action was arbitrary and capricious, an abuse of discretion, unwarranted by the facts, and contrary to the Guaranty Agreements, 24 C.F.R. 390.3(h), and the Fifth Amendment. In its opinion, the district court characterized this claim as a "constitutional tort" not justiciable against the agency. The only rationale given by the district court for this unique determination was that STI had "neither alleged nor claimed the APA to be a basis of jurisdiction." The Sixth Circuit affirmed both the judgment and reasoning of the district court. This is patent error for two reasons. First, STI did in fact allege the APA as one of its jurisdictional grounds by its amended complaint. Secondly, this Court has held that the APA is *not* an independent grant of jurisdiction. *Califano* v. *Sanders,* 430 U. S. 99 (1977). The decision of the court below is in direct conflict with the opinion of this Court.

This action should not be barred from the jurisdiction of the district court by a characterization as a constitutional tort. STI has been the victim of a de facto debarment since September of 1980 and is fighting for its very survival. The only remedy which can correct this injustice is to set aside the action of GNMA and require GNMA to comply with 24 C.F.R. 390.3(h). This relief combined with an award of incidental and consequential damages would make STI whole again. It is only the district court which has the ability to grant this relief. A transfer to the Court of Claims would ensure that STI is granted neither

form of relief because the Court of Claims lacks jurisdiction tc consider either claim.

A transfer to the Court of Claims as ordered by the court below is contrary to the interests of justice because the practical effect will be the total preclusion of a determination on the merits by any court. The Court of Claims does not have jurisdiction over claims of arbitrary and capricious action by HUD and when such claims are transferred to it by district courts, the action is dismissed with prejudice. *Diamond* v. *United States,* 657 F. 2d 1194 (Ct. Cl. 1981). Similarly, the Court of Claims cannot exercise jurisdiction over claims for money damages where the funds to pay damages are not derived from the United States Treasury. *Kyer* v. *United States,* 369 F. 2d 714 (Ct. Cl. 1966), *cert. denied,* 387 U. S. 929 (1967). This is the very danger which was perceived by the Fifth Circuit in *Industrial Indemnity, supra.*

The danger of such a result in the present case is not merely speculative because it has already been rather forcefully argued by GNMA's counsel in the Court of Claims, in another case involving STI and GNMA. In the Court of Claims, GNMA's counsel contended that it would be improper for that court to exercise jurisdiction over the case because the funds to pay damages would not come from the United States Treasury. In the court below in this action, the very same counsel argued on behalf of the very same agency that the district court cannot exercise jurisdiction over GNMA either. The opinion of the Sixth Circuit herein

merely confirms GNMA's arrogant belief that no court has the power to review its wrongful actions.

Because the government believes it can evade the jurisdiction of any court by arguing directly conflicting contentions of jurisdiction to the Court of Claims and to the district courts, it has created a bottleneck of litigation which is plaguing the federal court system. In the case of *Diamond* v. *United States, supra,* alone, this "whip-sawing" by the government produced six years of litigation over the issue of which court had jurisdiction to hear the merits of the claims against HUD. Nine circuits have considered this jurisdictional question with eleven cases being decided within the last five years concerning the waivers for HUD and GNMA. It is a question of law which affects not only HUD and GNMA, but each and every one of the "sue and be sued" agencies of the federal government. A definitive rule by the Supreme Court should be established not only to ensure uniform application of federal law in the lower courts, but also to reduce the amount of unnecessary litigation and to encourage early settlement of cases against the government.

As in most cases involving the government, GNMA, in this action, has refused to enter into meaningful settlement negotiations knowing full well that it can drag the action on for years while it argues the flip sides of the jurisdictional issue. If this Court established a definite rule on which court could entertain the merits of such actions, trial dates would be set and meaningful settlement negotiations would begin. Under present conditions, the government has no need to

settle because it knows it can win by default. Private businesses are hard pressed financially to litigate cases for six years without ever reaching the merits unless of course they are IBM or AT&T.

Finally, there are two other policy considerations which should play a role in this Court's decision. A Congressional mandate that an agency be suable in district court establishes the right of citizens to a trial by jury against the agency and eliminates the burden of litigating the case in Washington, D.C. The Ninth Circuit considered this factor critical in holding that the Small Business Administrator could be sued in the district court for more than $10,000.00 *Munoz* v. *SBA*, 644 F. 2d 1361 (9th Cir. 1981). That court elaborated on the importance of the public policy against imposing on small businesses the burdensome expense of pressing their claims in the Court of Claims when the SBA's sue and be sued clause allowed suit in a nearby district court.

Trial in the Court of Claims is conducted without a jury and a jury trial is one of the major rights in the district courts. As this Court held in *Jacob* v. *City of New York*, 315 U. S. 752 (1942):

> A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

These considerations should not be lightly dispensed with by the lower court's erroneous ruling that the Court of Claims has exclusive jurisdiction over STI's claims against GNMA.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Appendix

No. 81-5464

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL T. ISAAC & ASSOCIATES, INC., - *Plaintiff-Appellant,*

v.

GOVERNMENT NAT'L. MORTGAGE ASSOCIATION;
MOON LANDRIEU, Secy. of Dept. of Housing and Urban Development;
INSPECTOR GENERAL OF THE DEPT. OF HOUSING AND URBAN DEVELOPMENT;
SECY. OF THE UNITED STATES TREASURY, - - - - - *Defendants-Appellees.*

ORDER DENYING PETITION FOR REHEARING—
Filed January 27, 1982

Before KEITH, BROWN and JONES, Circuit Judges.

A majority of the judges of the Court having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the Court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

81-5464

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL T. ISAAC & ASSOCIATES, INC., - *Plaintiff-Appellant,*

v.

GOVERNMENT NAT'L. MORTGAGE ASSOCIATION;
MOON LANDRIEU, Secy. of Dept. of Housing and Urban Development;
INSPECTOR GENERAL OF THE DEPT. OF HOUSING AND URBAN DEVELOPMENT;
SECY. OF THE UNITED STATES TREASURY, - - - - - *Defendants-Appellees.*

ORDER—Filed December 11, 1981

Before: KEITH, BROWN, and JONES, Circuit Judges.

Plaintiff-Appellant Samuel T. Isaac & Associates, Inc. ("STI") appeals from five partial summary judgments entered for the Government National Mortgage Association ("GNMA"), the Secretary of the Department of Housing and Urban Development ("HUD"), the Secretary of the Treasury, and the Inspector General of HUD. The United States District Court for the Eastern District of Kentucky granted these partial summary judgment motions in its Memorandum and Order of June 17, 1981, and its Amended Opinion and Order dated and entered June 19, 1981.

STI was an issuer of mortgage-backed securities under GNMA's Mortgage Back Securities Program ("MBSP") from 1975 until GNMA terminated its contracts on Sep-

tember 2, 1980. Once these securities are sold and proceeds paid to the issuer, the issuer performs pool administration or servicing functions. These servicing functions are incorporated into the "Guaranty Agreements" entered into between GNMA and the issuer.

In August, 1980, STI wrote a check for approximately $8,000 to pay another investor, Morgan Guaranty Bank ("Morgan"). This check was returned to Morgan for insufficient funds. Allegedly this was the third time in the past five months that STI had issued checks to Morgan that were returned for insufficient funds. Consequently, Morgan did not simply re-deposit the check. On August 17, 1980, Morgan telephoned GNMA to register its complaint about the practice of STI of issuing bad checks. During this conversation Morgan allegedly advised GNMA of prior bad checks issued by STI in April and June of 1980.

On August 27, 1980, GNMA advised STI to wire funds from STI to cover the bad check. On August 28, 1980, GNMA asked Morgan whether it had received the wire transfer of funds from STI to cover the check. Morgan replied that it had not received the transfer. On August 29, 1980, GNMA wired the funds to Morgan. Subsequently STI inquired about the wire transfer. GNMA advised STI to wire them the money. Allegedly GNMA did not advise STI that it could cure the default caused by the bad check by either wiring the funds to Morgan or to GNMA.

On September 2, 1980, GNMA officials prepared and hand delivered a notice of default to STI. The default letter extinguished STI's rights to service the GNMA mortgages, pursuant to 12 U.S.C. §1721(g) and the terms of the "Guaranty Agreements".

On September 4, 1980, GNMA officials, including Mr. Laurent, the President of GNMA, conferred with Mr. Samuel T. Isaac, the President of STI, and STI's counsel in Washington, D.C. Mr. Isaac presented bank statements

to explain the reasons the check had been returned for insufficient funds. The GNMA officials and Mr. Isaac discussed STI's performance. GNMA decided, however, not to reverse its decision to terminate the contracts.

On September 5, 1980, STI filed a complaint in the United States District Court for the District of Columbia. STI's complaint claimed breach of contract, tortious interference with contract rights, and violation of due process. STI requested declaratory and injunctive relief. On September 11, 1980, STI voluntarily dismissed its action in the United States District Court for the District of Columbia.

STI later filed essentially the same claim in the United States District Court for the Eastern District of Kentucky. In January, 1981, GNMA filed a motion for summary judgment. STI opposed this motion, and filed a cross-motion for summary judgment. STI argued that its due process rights under the Constitution, the Administrative Procedure Act ("APA"), the statutes and regulations and the "Guaranty Agreement" had been violated. Accordingly, STI asked the district court to set aside GNMA's action.

On June 17, 1981, the District Court ruled on the cross motions for summary judgment without oral argument. The Court granted five partial summary judgment motions against STI. The court characterized STI's claim as a constitutional tort claim, which could not be brought against the agency itself. The Court also held that STI's common law tort claim for interference with the contract between STI and GNMA was prohibited by an exception to the Federal Tort Claims Act, 26 U.S.C. §2680(n). The District Court held that the Court of Claims had exclusive jurisdiction over STI's breach of contract claim. Finally, the Court denied STI's request for writs of mandamus.

STI perfected this appeal. After considering the briefs, record, and oral arguments, we agree with the judgment and reasoning of the District Court. Accordingly, we affirm the District Court's order granting the partial summary motions.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiffs*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

MEMORANDUM OPINION AND ORDER—Filed June 17, 1981

This is an action for monetary, declaratory and injunctive relief from an alleged breach of contract, tortious interference with contract rights, and violation of due process. On September 2, 1980, Samuel T. Isaac & Associates, Inc. (STI) received a letter of extinguishment from the Government National Mortgage Association (GNMA). By this letter, GNMA took away the entire loan portfolio of STI, which consisted of fifteen mortgage-backed securities pools. The original principal amount of each pool, when issued by STI, was slightly over $1,000,000.00. All funds from STI's custodial accounts, approximately $290,000.00, also were withdrawn on September 2, 1980.

On September 11, 1980, STI filed its original complaint. That complaint asserted, in essence, that GNMA's actions were invalid, an abuse of discretion and a violation of due process. STI sought declaratory and injunctive relief. On October 7, 1980, STI filed an amended complaint. In it STI sought damages from GNMA for the direct effect of GNMA's actions. STI also asserts that the Federal Na-

tional Mortgage Association (FNMA) is attempting to terminate its servicing agreement with STI as a direct and proximate result of GNMA's actions and seeks damages from GNMA. On November 3, 1980, STI tendered its second amended complaint, which was filed on November 18, 1980. That complaint added, *inter alia,* a request for writs of mandamus against the Secretary of Housing and Urban Development (HUD), the Inspector General of HUD and the Secretary of Treasury for their action or inaction in connection with GNMA's extinguishment of STI as a servicer of mortgage-backed securities.

Plaintiff's action apparently consists of a constitutional tort claim, a common law tort claim, a contract claim and several requests for writs of mandamus. The first claim this Court will consider is the constitutional tort claim by STI against GNMA for deprivation of its due process rights. Serious questions regarding sovereign immunity and the jurisdiction of this Court have been raised. See *Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment* (Defendants' Memorandum); *Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment* (Plaintiff's Memorandum); *Defendants' Reply in Support of their Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment* (Defendants' Reply). The Court need not discuss those issues here. A constitutional tort damages suit is a judicially created remedy for a wrong committed by an individual federal official. See *Bivens* v. *Six Unknown Fed. Narcotic Agents,* 403 U. S. 388 (1971). The claim here is against a federal agency, not an individual official. The Court expresses no opinion on the merits of any constitutional tort claim which the plaintiff may have against individual GNMA officials. There is no constitutional tort cause of action, however, against the agency itself. See *Davis* v.

Passman, 442 U. S. 228 (1979); *Butz* v. *Economou*, 438 U. S. 478 (1978).

The plaintiff also asserts a common law tort claim against GNMA for interference with the contract between STI and FNMA. The Court need not decide whether or not GNMA has sovereign immunity from this claim. In addition to a waiver of sovereign immunity, there must be a grant of jurisdiction to this Court. See *Marcus Garvey Square* v. *Winston Burnett Const.*, 595 F. 2d 1126, 1131 (9th Cir. 1979). The sue and be sued clause contained in the provision concerning the general powers of GNMA, 12 U.S.C. Section 1723a(a), is not a grant of jurisdiction over STI's common law tort claims. 28 U.S.C. Section 2679(a). The FTCA provides the exclusive remedy for this claim. *Id.* The plaintiff's argument that the FTCA is not an exclusive remedy refers only to constitutional torts. *Plaintiff's Memorandum.* One of the torts barred under the FTCA is "interference with contract rights." 28 U.S.C. Section 2680(h). Enumeration under the exceptions provisions of the FTCA does not remove those torts from the ambit of the Act altogether. Rather, the FTCA includes these torts, but does not permit suit on them. See *Expeditious Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F. 2d 289 (D.C. Cir. 1977). The tort alleged falls squarely within an exception to the FTCA. 28 U.S.C. Section 2680(h).

The third claim by STI is for GNMA's alleged breach of the contract between it and STI. This claim is for more than $10,000.00. The claim affects the government's fiscal, proprietary or programmatic interests and is therefore against the United States. Cf. 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* Section 3655. Such claims are within the exclusive jurisdiction of the Court of Claims. See 28 U.S.C. Section 1491; 28 U.S.C. Section 1346(a)(2). Plaintiff's myriad and

byzantine attempts to evade the Congressional intent that suits for more than $10,000.00 based on government contracts should be heard in the Court of Claims are quite unpersuasive. See *Molton, Allen & Williams, Inc.* v. *Harris*, 436 F. Supp. 853 (D.D.C. 1977).

The final thrust of plaintiff's attack consists of three requests for writs of mandamus against the Secretary of HUD, the Inspector General of HUD and the Secretary of the Treasury. The jurisdiction of this Court is based on the Mandamus and Venue Act, 28 U.S.C. Section 1361. The plaintiff seeks a writ of mandamus directing the Secretary of HUD to order GNMA to comply with the Guaranty Agreement. The manner in which the Secretary of HUD chooses to oversee the actions of GNMA is not a duty owed to the plaintiff. See 28 U.S.C. Section 1361. Mandamus will lie only if the duty imposes a mandatory or ministerial obligation. *Short* v. *Murphy*, 512 F. 2d 374 (6th Cir. 1975). This is a matter within the discretion of the Secretary and no abuse of that discretion has been shown.

The plaintiff further seeks a writ of mandamus directing the Inspector General of HUD to review the actions of Fred Taylor and GNMA and stop any abuses found. Whether or not to initiate an investigation is within the discretion of the Inspector General. 5 U.S.C.App. I Section 6(a)(2).

Finally, the plaintiff asks for a writ of mandamus against the Secretary of the Treasury to stop spending the funds of the United States to make principal and interest payments when STI is able to make such payments. No such payments are presently being made.

IT IS THEREFORE ORDERED:

(1) That the motion of GNMA for partial summary judgment on the constitutional tort claim of STI for the deprivation of due process is hereby GRANTED;

(2) That the motion of GNMA for partial summary judgment on the common law tort claim of STI for interference with contract rights is hereby GRANTED;

(3) That the contract claim of STI against GNMA, for money damages only, is hereby TRANSFERRED to the Court of Claims under 28 U.S.C. Section 1406(c);

(4) That the motion of the Secretary of HUD for partial summary judgment on the request for a writ of mandamus is hereby GRANTED;

(5) That the motion of the Inspector General of HUD for partial summary judgment on the request for a writ of mandamus is hereby GRANTED;

(6) That the motion of the Secretary of the Treasury for partial summary judgment on the request for a writ of mandamus is hereby GRANTED;

(7) That all motions pending before this Court or the Magistrate not related to the contract claim before the Court of Claims are hereby DENIED, as moot;

(8) That all orders regarding supervision by this Court or the Magistrate of the servicing of the mortgages are hereby CANCELLED, SET ASIDE AND HELD FOR NAUGHT.

This the 17th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiff*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

PARTIAL SUMMARY JUDGMENT—Filed June 17, 1981

Upon the motion of the defendants for summary judgment, and the Court being sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED that, on its common law tort claim, STI take nothing. There being no just reason for delay, final judgment shall be entered, pursuant to Rule 54(b), Fed.R.Civ.P.

This the 17th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiff*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

PARTIAL SUMMARY JUDGMENT—Filed June 17, 1981

Upon the motion of the defendants for summary judgment, and the Court being sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED that, on its request for a writ of mandamus against the Secretary of HUD, STI take nothing. There being no just reason for delay, final judgment shall be entered, pursuant to Rule 54(b), Fed.R.Civ.P.

This the 17th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiff*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

PARTIAL SUMMARY JUDGMENT—Filed June 17, 1981

Upon the motion of the defendants for summary judgment, and the Court being sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED that, on its request for a writ of mandamus against the Secretary of the Treasury, STI take nothing. There being no just reason for delay, final judgment shall be entered, pursuant to Rule 54(b), Fed.R.Civ.P.

This the 17th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiff*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

PARTIAL SUMMARY JUDGMENT—Filed June 17, 1981

Upon the motion of the defendants for summary judgment, and the Court being sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED that, on its request for a writ of mandamus against the Inspector General of HUD, STI take nothing. There being no just reason for delay, final judgment shall be entered, pursuant to Rule 54(b), Fed.R.Civ.P.

This the 17th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiff*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

PARTIAL SUMMARY JUDGMENT—Filed June 17, 1981

Upon the motion of the defendants for summary judgment, and the Court being sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED that, on its constitutional tort claim, STI take nothing. There being no just reason for delay, final judgment shall be entered, pursuant to Rule 54(b), Fed.R.Civ.P.

This the 17th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 80-169

SAMUEL T. ISAAC & ASSOCIATES, INC. - - *Plaintiff*

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Et Al. - - - - *Defendants*

AMENDED OPINION—Filed June 19, 1981

On the Court's own motion the opinion heretofore entered is hereby amended by adding the following sentence:

> The plaintiff neither alleged nor claimed the Administrative Procedure Act, 5 U.S.C. Sections 701-706 to be a basis for jurisdiction.

The previous opinion and all orders entered pursuant thereto are hereby ratified and confirmed.

This the 19th day of June, 1981.

(s) Scott Reed, Judge
United States District Court

No. 77-1902

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil Action 76-0054

MOLTON, ALLEN & WILLIAMS, INC. - - *Appellant*

v.

PATRICIA ROBERTS HARRIS, Secretary, Dept. of Housing and Urban Development, et al. - *Appellees*

ORDER—Filed January 9, 1978

BEFORE: McGowan and MacKinnon, Circuit Judges.

On consideration of appellant's motion for summary reversal, the opposition thereto and of appellants' reply, it is

ORDERED by the Court that appellant's aforesaid motion for summary reversal is granted.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

Per Curiam

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

. . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 701. Application; Definitions

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law . . .

5 U.S.C. § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1)

affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703. Form and venue of proceedings

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judical review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

NATIONAL HOUSING ACT

12 U.S.C. § 1702

. . . The Secretary shall, in carrying out the provisions of this title and titles, II, III, V, VI, VII, VIII, IX, X and XI be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

12 U.S.C. § 1720

(d) Obligations of the Association. The Association may issue to the Secretary of the Treasury its obligations in an amount outstanding at any one time sufficient to enable the Association to carry out its functions under this sec-

tion, such obligations to mature not more than five years from their respective dates of issue, to be redeemable at the option of the Association before maturity in such manner as may be stipulated in such obligations. Each such obligation shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average rate on outstanding marketable obligations of the United States as of the last day of the month preceding the issuance of the obligation of the Association. The Secretary of the Treasury is authorized to purchase any obligations of the Association to be issued under this section, . . .

12 U.S.C. § 1721

(g) Guarantee of principal and interest on trust certificates and other securities; fees and charges; subrogation; contract for extinguishment of right, title, or interest in mortgages; full faith and credit. The Association is authorized, upon such terms and conditions as it may deem appropriate, to guarantee the timely payment of principal of and interest on such trust certificates or other securities as shall (1) be issued by the corporation under section 304(d) [12 USCS § 1719(d)], or by any other issuer approved for the purposes of this subsection by the Association, and (2) be based on and backed by a trust or pool composed of mortgages which are insured under the National Housing Act or title V of the Housing Act of 1949 [42 §§ 1471 et seq.], or which are insured or guaranteed under the Servicemen's Readjustment Act of 1944 [former 38 USCS §§ 693 et seq.] or chapter 37 of title 38, United States Code [38 USCS §§ 1801-1827], or which are guaranteed under title XIII of the Public Health Service Act [42 USCS §§ 300e et seq.]. The Association shall collect from the issuer a reasonable fee for any guaranty under this subsection and shall make such charges as it may determine to be

reasonable for the analysis of any trust or other security arrangement proposed by the issuer. In the event the issuer is unable to make any payment of principal of or interest on any security guaranteed under this subsection, the Association shall make such payment as and when due in cash, and thereupon shall be subrogated fully to the rights satisfied by such payment. Any Federal, State, or other law to the contrary notwithstanding, the Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securites are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. The full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guaranty under this subsection. . . .

12 U.S.C. § 1723a(a)

. . . in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, . . .

28 U.S.C. § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs,

and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof or any officer or employee thereof in his official capacity. . . .

28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . .

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchange, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. . . .

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

24 C.F.R. § 390.3

(h) If any issuer, subsequent to the issuance of securities guaranteed by the Association, should fail in a material

way to be in compliance with any of the requirements prescribed in this section or of the guaranty agreement, the Association may bring proceedings to default such issuer, in accordance with the following procedures: The Association shall serve the issuer, by hand delivery or by certified or registered mail, with a written notice stating the facts incident to such failure and setting forth such affirmative requirements as the Association may consider necessary to correct such failure to be in compliance. Steps to correct or otherwise remedy such failure shall be carried out in accordance with such procedures as may be set forth in the guaranty agreement.

24 C.F.R. § 390.47 Fees.

The Association may impose application fees, guaranty fees, securities transfer fees, and such other fees as it may deem appropriate.

Opposition

Office - Supreme Court, U.S.
FILED
JUL 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1970

In the Supreme Court of the United States

OCTOBER TERM, 1982

SAMUEL T. ISAAC & ASSOCIATES, INC., PETITIONER

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the limited waivers of sovereign immunity contained in 12 U.S.C. 1702 and 1723a(a) authorize a suit against the Department of Housing and Urban Development and the Government National Mortgage Association for consequential damages arising out of an alleged breach of contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1970

SAMUEL T. ISAAC & ASSOCIATES, INC., PETITIONER

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-23) is not reported, but the decision is noted at 673 F. 2d 1330. The opinion of the district court (Pet. App. 24-28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1981. A timely petition for rehearing was denied on January 27, 1982 (Pet. App. 19). The petition for a writ of certiorari was filed on April 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 1 of the National Housing Act, 12 U.S.C. 1702, provides in part:

> The Secretary [of Housing and Urban Development] shall, in carrying out the provisions of this subchapter [Title I] and subchapters II, III, V, VI, VII, VIII, IX-A, IX-B, and X of [the National Housing Act], be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

Section 309(a) of the National Housing Act, 12 U.S.C. 1723a(a), provides in pertinent part:

> Each of the bodies corporate named in Section 1717(a)(2) [of the National Housing Act, *i.e.*, the Government National Mortgage Association and the Federal National Mortgage Association] shall have power * * * in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, but no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of the Association [GNMA] or against the Association with respect to its property * * *.

STATEMENT

Petitioner brought this action in the United States District Court for the Eastern District of Kentucky seeking declaratory, injunctive and monetary relief against the Government National Mortgage Association (GNMA), the Secretary of Housing and Urban Development, and two other federal defendants (Pet. App. 24-25).[1] Petitioner, a

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[1] Petitioner's second amended complaint sought a writ of mandamus against the Inspector General of Housing and Urban Development and the Secretary of the Treasury for their "action or inaction" in connection with its claims (Pet. App. 25).

mortgage banker, alleged that GNMA had improperly terminated its right under various "Guaranty Agreements" to act as a servicer of 15 mortgage-backed securities pools (*id.* at 20-21, 24). Petitioner sought a court order setting aside GNMA's termination of its servicing functions as well as "incidental and consequential damages" allegedly caused by the termination (Pet. 4; Pet. App. 24-25).

GNMA is a "body corporate" within the Department of Housing and Urban Development. 12 U.S.C. 1717(a)(2)(A). Its statutory functions under Title III of the National Housing Act, 12 U.S.C. (& Supp. IV) 1716 *et seq.*, include responsibility for facilitating a secondary mortgage market for government-insured mortgages. See 12 U.S.C. (& Supp. IV) 1716, 1721(g). To accomplish this purpose, GNMA guarantees under the full faith and credit of the United States the timely payment of principal and interest on privately issued securities that are backed by government-insured mortgages. 12 U.S.C. (Supp. IV) 1721(g); 24 C.F.R. Part 390. Under this program, a private mortgage banker (such as petitioner) may apply to GNMA to become an issuer of mortgage-backed securities and for a commitment by GNMA to guarantee the securities. If the application is approved, the issuer originates or purchases a pool of government-insured mortgage loans. It then issues GNMA-guaranteed securities, backed by these mortgages, to investors. The issuer retains servicing functions with respect to the underlying mortgages, *i.e.*, the issuer receives mortgage payments from the individual mortgagors and remits the proceeds, less the issuer's servicing fee, to the investors currently holding the securities. Since GNMA and the United States government are liable to the holders of the securities for their ultimate payment, GNMA retains the right to terminate the services of an issuer and to require the transfer of its mortgage portfolio, either to GNMA or to another designated servicer, in the event the issuer defaults on its payment or servicing obligations. The contractual

relationship between the issuer and GNMA is governed by standard "Guaranty Agreements." See 12 U.S.C. (Supp. IV) 1721(g); 24 C.F.R. 390.13, 390.31 and 390.46.

In this case GNMA exercised its right under the Guaranty Agreements to terminate petitioner's servicing of 15 mortgage-backed securities pools because of petitioner's repeated failure properly to remit funds to a substantial investor, which indicated an adverse change in petitioner's business status (Pet. App. 21-22). Petitioner thereafter filed this action in the district court seeking to set aside GNMA's action and also seeking consequential damages. Respondents moved to dismiss on the ground that the action was in essence a tort or a breach of contract claim that was not encompassed by the limited "sue and to be sued" provisions of the National Housing Act, 12 U.S.C. 1702, 1723a(a). The government argued that petitioner could prosecute a breach of contract claim under the Tucker Act and that, since its money claim exceeded $10,000, the United States Court of Claims had sole jurisdiction. See 28 U.S.C. (Supp. IV) 1346(a)(2) and 1491. The district court agreed with the government (Pet. App. 26-27). The district court further held that GNMA's decision to terminate rather than retain petitioner's services was not a ministerial decision and was not subject to the Mandamus Act, 28 U.S.C. 1361 (Pet. App. 27). The court of appeals affirmed on the basis of the district court's reasoning (*id.* at 20-23).[2]

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[2]The district court had meanwhile retained jurisdiction over government counterclaims that sought to compel petitioner to turn over the mortgage portfolios to a newly designated servicer and to desist from advising mortgagors to continue remitting payments to it. On November 25, 1981, the district court held for the government on these counterclaims and petitioner thereafter appealed. That appeal is currently pending in the Sixth Circuit (No. 82-5054).

ARGUMENT

Petitioner asserts that its suit for consequential damages for alleged breach of contract by the Government National Mortgage Association is within the National Housing Act's limited waivers of sovereign immunity, 12 U.S.C. 1702, 1723a(a). The reported decisions cited by petitioner either do not address this question or hold that claims for consequential damages are not within the National Housing Act waivers. Further review of the issue by this Court should await such time as a clear conflict among the circuits is shown to exist.[3]

1. Most of the cases involving the scope of the "sue and to be sued" provisions of the National Housing Act have been suits against the Secretary of Housing and Urban Development arising out of the Secretary's mortgage insurance activities under Title II of the Act, rather than the mortgage-backed securities programs of Title III. The only reported opinion of a court of appeals dealing with the amenability of GNMA and the Secretary of HUD to a suit for consequential damages arising from a Title III activity (for alleged breach of a mortgage sales agreement) held that such a claim was not encompassed by 12 U.S.C. 1702 or 1723a(a). *Lomas & Nettleton Co.* v. *Pierce*, 636 F. 2d 971 (5th Cir. 1981). That decision is correct. The court in *Lomas* pointed out that neither a "separate fund" nor an "obligation" existed or was imposed on HUD or GNMA for payment of "an award of compensatory damages for breach of contract." *Id.* at 973-974. Since such a judgment could only

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[3]The only specific authority cited by petitioner in support of its position is an unreported and unexplained order of a motions panel of the District of Columbia Circuit. Order of Jan. 9, 1978 (Pet. App. 35), summarily reversing *Molton, Allen & Williams, Inc.* v. *Harris*, 436 F. Supp. 853 (D. D.C. 1977). The subsequent opinion, reported at 613 F. 2d 1176 (D.C. Cir. 1980), dealt solely with the merits of the breach of contract claim in that case, not with the issue of jurisdiction.

" 'expend itself in the public treasury,' " a claim for incidental damages for breach of contract is, if anything, a Tucker Act claim, and not a claim permitted by the National Housing Act. *Id.* at 974, quoting *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963).

Other cases disposing of "consequential damages" claims against the Secretary of HUD under 12 U.S.C. 1702 are in accord. See, *e.g.*, *Armor Elevator Co.* v. *Phoenix Urban Corp.*, 655 F. 2d 19, 22 (1st Cir. 1981) (consequential damages action for alleged breach of regulatory duties brought against the Secretary of HUD by subcontractors on HUD-insured housing project is not encompassed by 12 U.S.C. 1702); *United States* v. *Adams*, 634 F. 2d 1261, 1265 (10th Cir. 1980) (12 U.S.C. 1702 does not encompass a "contract damage suit" for consequential damages); *Unimex, Inc.* v. *United States Department of Housing and Urban Development*, 594 F. 2d 1060, 1060-1061 (5th Cir. 1979) (consequential damages claim for alleged wrongful refusal to process loan application is not encompassed by 12 U.S.C. 1702); *DSI Corp.* v. *Secretary of HUD*, 594 F. 2d 177, 180 (9th Cir. 1979) (consequential damages claims against the Secretary of HUD for alleged improper administration of HUD-insured mortgage loans are not encompassed by 12 U.S.C. 1702).[4] While these decisions may vary in their particular reasoning, they uniformly hold that Congress did not permit suits for consequential damages under the National Housing Act when it enacted the "limited" waiver in 12 U.S.C. 1702.

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[4]See also *Marcus-Garvey Square* v. *Winston Burnett Construction Co.*, 595 F. 2d 1126, 1132 (9th Cir. 1979) (12 U.S.C. 1702 not applicable to suit seeking "hold back" funds on HUD-insured construction project). The Ninth Circuit, however, has reached a contrary result in construing the "sue and to be sued" provision in the Small Business Act, 15 U.S.C. 634(b)(1). See *Munoz* v. *SBA*, 644 F. 2d 1361 (9th Cir. 1981).

This conclusion is borne out by the legislative history of 12 U.S.C. 1702, which characterizes the provision as simply a "minor clarifying amendment[]." See S. Rep. No. 1007, 74th Cong., 1st Sess. 24 (1935); *Armor Elevator Co., supra,* 655 F. 2d at 20.[5] The provision was designed primarily to encourage the making of insured (or guaranteed) mortgage loans by lenders who otherwise would be hesitant to do so "lest there might be defaults which could not be prosecuted because they were claims against the United States." *Korman* v. *FHA,* 113 F. 2d 743, 746 & n.15 (D.C. Cir. 1940), citing *In re Wilson,* 23 F. Supp. 236, 240 (N.D. Tex. 1938). Thus, the purpose of Section 1702 (and by analogy, Section 1723a(a)) was to permit suits by lenders or investors to enforce the insurance or guarantee obligations of HUD (or GNMA), or suits to enforce other actual monetary obligations entered into by these agencies in carrying out their statutory functions. See, *e.g., Ferguson* v. *Union National Bank,* 126 F. 2d 753 (4th Cir. 1942) (suit against FHA for insurance benefits).[6]

Suits for "consequential damages," unlike suits to enforce existing insurance, guarantee or other monetary obligations incurred by HUD in carrying out its duties, are simply not contemplated by 12 U.S.C. 1702 or 1723a(a). As

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[5]The provision was added to the 1934 National Housing Act by Section 344(a) of the Banking Act of 1935, ch. 614, 49 Stat. 722.

[6]Such suits have been prosecuted in the district courts under 12 U.S.C. 1702, *Ferguson* v. *Union National Bank, supra,* or in the Court of Claims under the Tucker Act, 28 U.S.C. (Supp. IV) 1491. See *National State Bank* v. *United States,* 357 F. 2d 704 (Ct. Cl. 1966). Subject matter jurisdiction for a district court suit otherwise within 12 U.S.C. 1702 has been held to be conferred by 28 U.S.C. 1331(a) on the theory that a money claim against a federal agency "arises under the * * * laws * * * of the United States." See *Southern Sog, Inc.* v. *Roland,* 644 F. 2d 376, 379-380 & n.7 (5th Cir. 1981) (suit to enforce release of a specific escrow fund controlled by HUD). Cf. *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943).

this Court held in *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), a case involving a garnishment claim to enforce an existing wage obligation incurred by the predecessor of HUD under Section 1 of the National Housing Act, the waiver of immunity in 12 U.S.C. 1702 was not intended "to enlarge [HUD's] liability" nor was it intended "to add one iota" to the monetary obligations of the agency under the National Housing Act. 309 U.S. at 249. Obviously, the amenability of HUD or GNMA to suit on a consequential damage claim *would* enlarge the monetary liability of these agencies beyond that imposed under the National Housing Act.

2. To the extent petitioner seeks damages for breach of an express or implied-in-fact contract with the government, as authorized under the Tucker Act, the claim must be brought in the United States Court of Claims since it exceeds $10,000. 28 U.S.C. (Supp. IV) 1346(a)(2), 1491. Petitioner is incorrect in stating that the Court of Claims "lacks jurisdiction" to consider such a claim (Pet. 14). The Court of claims would not have jurisdiction to award damages if no express or implied-in-fact contract has been breached, but it would have jurisdiction to consider whether such a contract existed and was breached. *Diamond* v. *United States*, 657 F. 2d 1194, 1197 (Ct. Cl. 1981).[7] Petitioner alleges a "breach of contract claim" (Pet. 5) and seeks "incidental and consequential damages" (Pet. 4). If petitioner believes the claim has merit, it should be

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[7] In *Diamond* the court rejected the plaintiff's claim because it concluded that no implied-in-fact contract existed (657 F. 2d at 1197-1199). In contrast, petitioner does allege the existence of a contract (Pet. 5). Therefore, petitioner's contention (Pet. 15) that the government is "arguing directly conflicting contentions of jurisdiction to the Court of Claims and to the district courts" is unfounded. The government did not "whip saw" the plaintiff in *Diamond*—it merely established that it had no contractual obligation.

prosecuted in the Court of Claims. The Tucker Act remedy is adequate and precludes exercise of jurisdiction under the Administrative Procedure Act to resolve contractual issues. See 5 U.S.C. 702, 704; *Warner* v. *Cox*, 487 F. 2d 1301 (5th Cir. 1974).

3. The other cases cited by petitioner do not involve claims for "consequential damages" for alleged breach of contract. They involve the question whether 12 U.S.C. 1702 waives sovereign immunity for claims against the Secretary of HUD founded on "unjust enrichment" theories. These cases generally involve claims for "hold back" funds resulting from contract disputes at HUD-insured building projects. See, *e.g.*, *Trans-Bay Engineers and Builders, Inc.* v. *Hills*, 551 F. 2d 370 (D.C. Cir. 1976); *S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block*, 608 F. 2d 28 (2d Cir. 1979); *Bor-Son Building Corp.* v. *Heller*, 572 F. 2d 174 (8th Cir. 1978). Compare *Merritt* v. *United States*, 267 U.S. 338 (1925) (quantum meruit claims not encompassed by Tucker Act), and *Berks Products Corp.* v. *Landreau*, 523 F. Supp. 304, 311-312 n.6 (E.D. Pa. 1981) (quantum meruit claim not encompassed by 12 U.S.C. 1702). The application of 12 U.S.C. 1702 to such claims is currently being litigated in two consolidated cases in the Fifth Circuit.[8] However, no unjust enrichment theory is asserted here and, hence, this case is not a proper vehicle to resolve the correctness of the *Trans-Bay* line of cases.

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[8] *Commercial Standard Insurance Co.* v. *Bryce Street Apartments, Ltd.*, No. 81-1578; *Industrial Indemnity, Inc.* v. *Pierce*, No. 82-1002. In an earlier decision, *Industrial Indemnity, Inc.* v. *Landrieu*, 615 F. 2d 644 (5th Cir. 1980), the court concluded that 12 U.S.C. 1702 encompasses certain unjust enrichment claims that can be paid out of money in HUD's General Insurance Fund. In the two cases currently before the Fifth Circuit, the United States is arguing that a more useful test for identifying claims falling within 12 U.S.C. 1702 is whether the claim is one to enforce a duly authorized statutory, regulatory or contractual obligation of HUD. See pages 7-8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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